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In the Supreme Court of the United States

OCTOBER TERM, 1983

HERB'S WELDING, INC. and
UNITED STATES FIDELITY & GUARANTY CO.

Petitioner

VERSUS

ROBERT H. GRAY

Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF AMICI CURIAE, TEXACO, INC., GULF OIL CORPORATION, AND AMOCO PRODUCTION COMPANY, U.S.A. IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
INTEREST OF AMICI CURIAE 1
SUMMARY OF ARGUMENT 2
ARGUMENT 3
CONCLUSION 17
CERTIFICATE OF SERVICE 19

TABLE OF AUTHORITIES

Cases: **Page**

Blanchard v. Engine & Gas Compressor Service, Inc., 613 F.2d 65 (5th Cir. 1980) 15

Boudreaux v. American Workover, Inc., 664 F.2d 463 (5th Cir. 1981); *Rehearing Granted* 664 F.2d 480 (5th Cir. 1982); Opinion on Rehearing 680 F.2d 1034 (5th Cir. 1982); *cert. denied*, __ U.S. __, 103 S.Ct. 815 (1983) . . 12, 13

Director, Office of Workmens Compensation Programs, v. Perini North River Associates, 459 U.S. 297, 103 S.Ct. 634 (1983) 8, 14

Gray v. Chevron Oil Co., 631 F.2d 1263 (5th Cir. 1980); 644 F.2d 540 (5th Cir. 1981) 9, 14, 15

Herb's Welding Inc. v. Gray, 703 F.2d 176 (5th Cir. 1983); *Reh. den, 711 F.2d 666 (1983); cert. gr.* 80 L.Ed.2d 122 (1984) 4, 5, 6, 7, 8

Nacirema Operating Company v. Johnson, 396 U.S. 212 (1969) 4, 9, 11, 13

Odom Constr. Co. v. United States Dep't. of Labor, 622 F.2d 110 (5th Cir. 1980); *cert. den*, 450 U.S. 966 (1981). 11

P. C. Pfeiffer Co., Inc. v. Ford, 444 U.S. 69 13

Pippen v. Shell Co., 661 F.2d 378 (5th Cir. 1981) 12

Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352 (1969) 4, 5, 6, 7, 8

St. Julien v. Diamond Drilling Co., 403 F.Supp. 1256 (E.D.La. 1975) 14

Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Co., 644 F.2d 1132 (5th Cir. 1981) 14

Thornton v. Brown & Root, Inc., 707 F.2d 149 (5th Cir. 1983); *cert. den*, __ U.S. __, 104 S.Ct. 735 (1983) 16

Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971) 9

STATUTES:

33 U.S.C. §902(3) 4, 6

33 U.S.C. §903 . . . . . 10, 16

43 U.S.C. §1333 *et seq.* 4

OTHER AUTHORITIES:

House Report 92-1441, 1972 U.S. Code Cong. & Admin. News 4698, 4708 10

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INTEREST OF AMICI CURIAE

Texaco, Inc., Gulf Oil Corporation, and Amoco Production Company, U.S.A., pursuant to Rule 36 of the Supreme Court Rules file this brief as Amici Curiae.

Amici are the owners and operators of a substantial number of fixed structures located within Louisiana teritorial waters dedicated to the production of petroleum

and other hydrocarbon substances. They employ a substantial number of persons who work on those structures. The decision of the Fifth Circuit Court of Appeals in this matter affects them directly, both with regard to the administration of their compensation programs for those employees and with regard to employees of independent contractors working aboard the inland artificial islands in question. Amici Curiae suggest that the Court should consider their contentions because of the substantial impact the Fifth Circuit's decision will have on them and other operators of such structures, and because no party to the appeal has an interest similar to theirs.

SUMMARY OF ARGUMENT

The Fifth Circuit decision in this matter inappropriately extends LHWCA coverage to an entire industry which was previously not covered by the Act. Such a massive extension of LHWCA coverage which flows from the decision below is exclusively the province of Congress. This Court has consistently deferred to the expertise and wisdom of Congress in this area and should do so in the present case.

The Fifth Circuit reached an unjustified conclusion when it characterized platforms in general as wharves without regard to the particular operational function of the structure, without regard to its size, without regard to the presence or absence of boat landings on a particular structure, and totally without evidence as to the claimant's actual situs at the time of his injury or what activity was normally conducted on that structure. To make such a finding without evidence constitutes taking judicial notice of adjudicative facts which are indeed in dispute.

The decision rendered by the Fifth Circuit herein cannot be reconciled with its own prior decisions and controlling precedent of the United States Supreme Court, holding that artificial islands devoted to the production of hydrocarbon resources are not inherently maritime in nature and that the process of producing hydrocarbons from beneath navigable waters is not maritime activity. The holding that this claimant is an employee within the coverage of the Act and that he was working on a situs covered by the Act is in direct conflict with substantial prior authority to the contrary.

Amici Curiae suggest to this Court that the Fifth Circuit's opinion portends a virtually unmanageable onset of claims for benefits under the LHWCA by employees and other workes injured on fixed structures in territorial waters subsequent to 1972. The time in which the Act permits claims to be filed does not commence running until a report is filed in the Office of Workers' Compensation programs. Reports have not been filed for workers on inland structures who are not engaged in cargo operations or vessel repair activity in the belief that they were subject to the appropriate state compensation act rather than LHWCA. As a consequence, a potential ten-year log jam of claims, including many where state benefits have been, and continue to be paid, could be created if the Fifth Circuit's decision is allowed to stand.

ARGUMENT

THE PANEL'S EXTENSION OF MARITIME SITUS TO INCLUDE FIXED PLATFORMS ON STATE WATERS CANNOT BE JUSTIFIED IN LAW OR IN FACT

The Fifth Circuit panel below opted, simply on its

own volition, to formulate an entirely new basis for awarding benefits under the Longshoremen's and Harbor Workers' Compensation Act.[1] (Hereinafter LHWCA) Without citing any authority other than misstating a passing reference made by this Court,[2] which arose in a totally inapposite factual and legal setting, the decision below attempts to bring countless numbers of previously uncovered oilfield workers under the ambit of the act. The Court of Appeals proceeded to accomplish this by holding, for the first time, that fixed platforms in state waters meet the situs requirements of the LHWCA simply because they are "like" wharves. This bold action apparently was taken to remedy what the Court perceived as "...a curious hole in Longshoremen's and Harbor Workers' Compensation Act coverage".[3] Amici Curiae contend that such a far reaching decision should not be left to the judicial fiat of an intermediate appellate court, but more appropriately, should be reserved for Congress.[4]

This case reached the Fifth Circuit on appeal from the Benefits Review Board which had held that claimant Gray was entitled to benefits as an employee covered under the Outer Continental Shelf Lands Act,[5] (hereinafter OCSLA), not the LHWCA.[6] No distinction is made in the appellate opinion as to the function of various structures found in inland waters, such as drilling platforms,

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[1] 33 U.S.C. §900 *et seq.*

[2] 395 U.S. 353 (1969).

[3] 703 F.2d 178.

[4] *Nacirema Operating Company v. Johnson*, 396 U.S. 212 (1969).

[5] 43 U.S.C. §1333 *et seq.*

[6] 33 U.S.C. §900 *et seq.*

production platforms, well jackets, tank batteries, compressor stations, and quarters structures. No consideration can be given on the record as it stands as to the size of the platform, whether it had a boat landing, or whether Gray's activities had anything to do with loading or unloading boats. These questions were not considered by the Board, as they were not relevant to determining coverage under the OCSLA. Consequently, there is no evidence which could support the Fifth Circuit's conclusion that a fixed platform should be treated as if it were a wharf adjoining navigable waters. Thus, the panel's declaration that, "Such platforms are essential to and customarily used in the loading and unloading of crews, supplies and oil. Their function is precisely that of wharves over navigable waters",[7] cannot be substantiated by the record that was before the Court. It is apparent that the Fifth Circuit simply formulated an entirely new basis for awarding benefits to the claimant by misconstructing this Court's earlier decision in *Rodrigue*[8] to enisle fixed platforms on navigable waters.

Although the Court of Appeals purportedly recognized[9] that *Rodrigue*[10] mandates that fixed platforms be treated as islands,[11] it nonetheless ignored the rationale behind this Court's holding, *i.e.* "...that maritime

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[7] 703 F.2d 178.

[8] *Rodrigue v. Aetna Casualty and Surety Company*, 395 U.S. 353 (1969).

[9] 703 F.2d at 179.

[10] 395 U.S. 353.

[11] *Id.* at 361.

law was inapposite to these fixed structures",[12] when it analogized fixed platforms to wharves. In reaching this decision, the Court of Appeals theorized that because this Court "likened"[13] fixed platforms to wharves in *Rodrigue* and since wharves were not covered under the Longshoreman and Harbor Workers' Compensation Act at the time of the *Rodrigue* decision, but as a result of the 1972 Amendments, wharves are presently covered under the Act, fixed platforms "likened" to wharves should likewise be covered siti at present. This analysis is flawed in several respects. First, *Rodrigue* was not concerned with the issue of Longshoreman of Harbor Workers' Compensation Act coverage, but rather with the issue of whether there was admiralty jurisdiction over fixed platforms, which the court answered in the negative. Secondly, it was within this limited context that the Court briefly mentioned wharves simply as illustrative of the non-applicability of admiralty jurisdiction principles to fixed platforms. Finally, contrary to the Fifth Circuit's analysis, this Court never likened fixed platforms to wharves, nor did it even infer that such a comparison could be drawn. The exact language of this Court wherein the word wharfs was mentioned is as follows:

> At a minimum, the legislative history shows that accidents on these structures, which under maritime principles would be no more under maritime jurisdiction than accidents on a wharf located above navigable waters, were not changed in character by the Lands Act.[14]

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[12] *Id.* at 363.

[13] 703 F.2d at 177.

[14] 395 U.S. at 366.

With all due respect to the Court of Appeals, this Court left no doubt whatsoever that fixed platforms were to be treated as islands and nothing more or nothing less.[15] The Fifth Circuit's reliance on *Rodrigue* as precedent for analogizing fixed platforms to wharves therefore is entirely misplaced. To recharacterize the essential nature of these structures merely because the 1972 Amendments of the L.H.W.C.A. were "expansive in nature" is untenable. The Fifth Circuit's analysis, built as it is upon such a tenuous foundation, should not be left to stand by this Court.

Even if the Fifth Circuit's sidestepping of the *Rodrigue* classification of fixed platforms as artificial islands is upheld, its statement that "...the jurisprudential concept of an island carries with it the concept of the island's shore and the function of the structure as a wharf projects from that 'land' "[16], concedes that the same concept necessarily requires that a distinction be made between the portions of the platform designated as the "wharf area" and the portions of the platform designated as "the island". Even assuming arguendo that some portion of a fixed platform can be likened to a "wharf", there is no evidence from which the Fifth Circuit could decide whether plaintiff was injured on the "wharf" portion of the fixed platform or the "island" portion of the fixed platform. There is nothing in the record which indicates either that the area of the platform where plaintiff was injured was used for loading and unloading, or that the entire platform, or *any part* of the platform was so used. Accordingly, the Court's finding that coverage existed under the LHWCA was predicated on a record barren of supportive evidence and should not be affirmed by this Court.

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[15] *Id.* at 352, 360.

[16] 703 at 178.

THE EXPANSION OF STATUS UNDER THE LHWCA WITHOUT CONGRESSIONAL AUTHORIZATION CANNOT BE SUPPORTED

It is the contention of Amici Curiae that the Fifth Circuit's opinion is an attempt to correct what it perceived to be congressional error. After briefly reviewing the Supreme Court decision in *Rodrigue*,[17] and the coverage provision of the 1972 Amendments to the Longshoreman and Harbor Workers' Compensation Act, the Court commented: "...it would be incongruous, therefore, not to extend LHWCA jurisdiction to the fixed platform in this case."[18] Shortly thereafter, it expressed the view that, "to bar from the acts coverage all fixed platform workers in the territorial waters would create a curious hole in LHWCA coverage. We decline to do it."[19] Still later in the opinion, the Court acknowledged that this case is distinguishable from *Director, Office of Workmens' Compensation v. Perini North River Associates*[20] when it stated that the claimant is "not within the group of workers traditionally covered prior to 1972".[21] Obviously, fixed platforms were not a covered situs under the pre-1972 Amendments Act, and therefore, the rationale of *Perini* is inapplicable to this case.

Whether a difference in applicable compensation regimes between oilfield workers on the Outer Continental Shelf and those doing similar work on artificial islands in

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[17] 395 U.S. 352 (1969).

[18] 703 at 178.

[19] *Id.*

[20] 459 U.S. 297, 103 S.Ct. 634 (1983).

[21] *Id.* at 179.

state waters is truly an incongruity, or whether that distinction is anomalous, are not issues which an intermediate Court of Appeals is empowered to redress. The geographical contour of coverage under the Act, with whatever incongruities, anomalies, or curiosities are included, is solely a matter for Congress to determine.[22] The reasoning espoused by this Court in *Victory Carriers, Inc. v. Law*,[23] applies with equal weight to this case. There, the suggestion was made that there should be coverage to workmen on wharves because they were doing essentially the same work that their co-workers were doing in the holds of ships only a short distance away. This Court answered that contention by declaring:

> ...Congress might well prefer not to extend the jurisdiction of the federal courts. On the other hand, if denying federal remedies to longshoreman injured on land is intolerable, Congress has ample power under Arts. I and II of the Constitution to enact a suitable solution.

This reasoning applies with equal weight to this case. Nothing in the specific provisions, or legislative history of the 1972 Amendments to LHWCA has been cited to support a finding of Congressional intent to extend coverage of the Act to oilfield workers in general. There is ample authority, however, to the contrary.[24]

In terms of coverage, the amendments did no more

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[22] *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969).

[23] 404 U.S. 202 (1971).

[24] *See, Bible v. Chevron Oil Co.*, 460 F.2d 1218 (5th Cir. 1972); *Gray v. Chevron Oil Co.*, 631 F.2d 1263 (5th Cir. 1980), 644 F.2d 540 (5th Cir. 1981).

than to extend landward the Act's coverage to those structures adjoining navigable waters which are "customaarily used by an employer in loading, unloading, repairing, or building a vessel."[25] The facts offered to support the Court of Appeals' reasoning, that the 1972 Amendments expanded coverage of the Act, that Congress had adopted the Act by reference in the OCSLA, that workers covered under the pure situs test prior to 1972 were not disenfranchised by the status test added by the amendments, and that the Act is to be interpreted liberally, do not, singly or collectively, give the Circuit Court the power to add oilfield workers to the coverage not specifically included by the language of the Act.

As the legislative history makes clear, Congress itself intended to make distinctions which would not survive the reasoning process employed by the Fifth Circuit in this case. The House Committee pointed out a distinction in coverage for employees doing clerical work as cargo checkers but not for those doing other clerical work for the same stevedore. The Committee also suggested a distinction in coverage between employees who handled cargo for transshipment from storage and those who placed it in storage from the vessel.[26] Certainly, those engaged in transshipment handling are no less "an integral part" of maritime commerce and are just as essential and indispensible to the furtherance of the cargo handling as the longshoremen who attach the slings in the hold of the ship.[27] Judicial extension of coverage determined by

[25] 33 U.S.C. §903(a).

[26] House Report 92-1441, 1972 U.S. Code Cong. & Admin. News 4698, 4708.

[27] 730 F.2d at 180.

comparing the contribution to the total endeavor of workers seeking to be added to coverage with that of workers clearly within the scope of the Act was specifically rejected in *Nacirema Operating Co. v. Johnson*.[28] For coverage to exist, it must be found specifically within the Act.

The Court of Appeals began its comparative analysis with the observation that, "Today, accidents upon wharves over navigable waters are within the statutory jurisdiction of LHWCA".[29] That statement is inaccurate; today, *some* accidents on wharves are covered by LHWCA. Some are not. There are two errors in the Fifth Circuit's reasoning process: (1) it engages in shaping coverage to please its own eye for symetry by (2) looking to the utility of the employee's contribution rather than questioning carefully whether it should be treated as maritime employment.[30] Many, if not most, employees in producing companies are just as necessary for recovery and sale of petroleum as a platform maintenance worker like claimant Gray, including refinery workers and service station employees, and therefore, could be covered employees under the Court's utility analysis if they were injured on a covered situs. The Court's emphasis on the utility of Gray's work neglects to focus on any differentiation between maritime and non-maritime employment, which should be the controlling consideration for finding maritime status.[31] The essential question here is whether maintenance work on an island has a significant relationship to traditional maritime activity involving navigation and commerce on

[28] 396 U.S. 212 (1969).

[29] *Id.* at 177-178.

[30] *See Id.* at 179.

[31] *Odom Construction Co. v. United States Dep't of Labor*, 622 F.2d 110 (5th Cir. 1980).

navigable waters. The answer must be negative, when the inapplicable notions of congruity and utility applied by the Fifth Circuit below are set aside.

NEITHER ARTIFICIAL ISLANDS NOR HYDROCARBON PRODUCTION ACTIVITIES ON THEM ARE INHERENTLY MARITIME

The Fifth Circuit reasons that claimant, Gray, is an employee covered by the LHWCA because the platform on which he was working functions as a wharf on navigable waters in the production of petroleum and other hydrocarbons from beneath the seabed, which function the Court perceives to be dedicated to the furtherance of maritime commerce. The Court of Appeals relied on *Pippen v. Shell Oil Co.*,[32] to find that the activity of producing hydrocarbon from beneath the seabed is maritime commerce. Pippen was injured on a vessel during the course of his employment and therefore, was in that group of workers traditionally covered by LHWCA before 1972. Thus, the Fifth Circuit's seminal finding that the production of oil and gas from the bed of navigable waters constitutes maritime commerce was purely gratuitous and unnecessary to its final decision. Further, the *Pippen* decision did not cite any legal authority for such a conclusion.

This concept was carried forward by the same Court in *Boudreaux v. American Workover, Inc.*[33] However, in that decision, Judge Gee pointed out in an eloquent dissent that a finding that "...drilling for and producing oil and gas from the inland seas has become—in and of itself—a part of maritime commerce or navigation so that all parties working

[32] 661 F.2d 378 (5th Cir. 1971).

[33] 664 F.2d 463 (5th Cir. 1981).

in connection with it are maritime employees" is simply beyond the scope of the intermediate appellate court's powers.[34] As stated by Judge Gee:

> "...and the third constitutes a giant legislative step, appropriate for the Congress but scarcely, in my view, for an intermediate appellate court. As to this last, there is little that I can say, since my difference with the majority apparently goes to our differing basic conceptions of the judicial function. If it were appropriate for us, and within our assigned powers, to extend LHWCA coverage to an entire industry because we think that extension wise or just, then my debate with my brothers in the majority would be one about prudence and economic policy. Since, however, I think formation of such major policy more appropriate to the Congress than to nonelective judges, I decline to embark on such a contest. The Supreme Court has consistently deferred to the expertise and wisdom of Congress in this area. In *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 224, 90 S.Ct. 347, 354, 24 L.Ed.2d 371 (1969), the Court declared that "[t]he invitation to move [the Jensen] line must be addressed to Congress, not to this Court." The Court reiterated this principle in *P. C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 73, 100 S.Ct. 328, 332, 62 L.Ed.2d 225 (1979). When the Congress wished to effect the last such massive extension of LHWCA coverage, one to the Outer Continental Shelf, it knew how to do so. Following *Pippen*, we do so ourselves today in a comparable area, without benefit of legislative process—no committee hearings, no balancing of risks and economic considerations, no open debate, and no submission to the executive for signature or veto—on the basis of a chain of deductive reasoning. I would not do so.

[34] *Id.* at 470.

As it has consistently done in the past, this Court should again defer to the legislature on such an enormous broadening of the Acts coverage.

In any event, the authority of *Pippen* has been rendered moot by the subsequent decision of the Supreme Court in *Director v. Perini North River Assoc.*[35] In *Perini*, the Court held that workers such as Pippen were covered by the Act, if they met the situs test which controlled coverage prior to the 1972 Amendments. Since Pippen worked on a vessel and would have been covered prior to 1972. the holding of *Perini* suggests at least that the *Pippen* statement lacks authority.[36]

In *Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Co.*,[37] the Fifth Circuit considered the applicability of maritime jurisdiction to a claim arising out of the blowout of a gas well being re-worked. In discussing the factors to be considered in the context of jurisdiction, the Court specifically held that the functions of the parties, the well owner and the drilling contractor, were "hardly of a peculiarly maritime nature."[38] The Court also held that the blowout in a canal slip dredged for the well location did not fall within the traditional concept of admiralty and maritime relationships.[39] If drilling or reworking a well in *Sohyde* is not a maritime activity when being performed from a drill barge, how can the same Circuit declare in this

[35] 459 U.S. 297, 103 S.Ct. 634, __ L.Ed.2d __ (1983).

[36] See, also, *St. Julien v. Diamond M Drilling Co.*, 403 F.Supp. 1256 (E.D.La. 1975).

[37] 644 F.2d 1132 (5th Cir. 1981).

[38] 644 F.2d at 1136.

[39] 644 F.2d at 1138.

case that "the discovery, recovery, and sale of oil and natural gas from the sea bottom...is maritime commerce?" To be sure, *Pippen* sought to distinguish *Sohyde* because the *Sohyde* court was considering whether the blowout bore a significant relationship to maritime activity and not whether work activity at the time of an injury bore a significant relationship to maritime activity. The fact remains, however, that the Court in this case, relying on *Pippen*, has declared that the production of hydrocarbons from the seabed is maritime activity, while in *Sohyde* the Court said it is not. There is an essential, irreconcilable conflict in these two points of view. Amici submit that *Sohyde* constitutes the better reasoned view.

This Court should take notice of the fact that this claimant previously pursued tort damages arising from the same accident for which he now seeks compensation benefits.[40] He lost the claim when the Fifth Circuit affirmed a summary judgment in favor of the defendant based on the authority of *Blanchard v. Engine & Gas Compressor Serv., Inc.*[41] The *Blanchard* case, applied particular provisions of the LHWCA to claims arising on fixed structures in state territorial waters. The Fifth Circuit's opinion now broadly suggests that dismissal of Gray's tort claim was inappropriate and that the *Blanchard* case went through two appellate opinions and a certification to the Louisiana Supreme Court all on a misconception as to which compensation regime would apply to the fixed structures involved.

This Court should recognize that the decision below is a sharp departure from basic approaches to the rights and responsibilities of employers and employees engaged

[40] *Gray v. Chevron Oil Co.*, 644 F.2d 540 (5th Cir. 1981).

[41] 613 F.2d 65 (5th Cir. 1980).

in oil industry activity within the state. The conclusion that production of minerals from the seabed constitutes "maritime commerce" and that work being performed by those so engaged is maritime employment cannot be substantiated by anything in the *Pippen or Boudreaux* opinions, nor by the most recent decision of this Court, *Thornton v. Brown and Root.*[42] No factual or legal basis for such a conclusion is offered by this case, nor the above cited opinions. Accordingly, there is nothing maritime about the work plaintiff was performing at the time of his injury and he should not come within the coverage of the LHWCA.

THE PANEL DECISION WOULD INVITE THE FILING OF AN OVERWHELMING NUMBER OF CLAIMS

The time limitation for filing a claim under LHWCA is keyed to the reporting of an injury by the employer. A claim can be filed at any time within one year following the report.[43] Amici Curiae suggest that most employers engaged in operations on fixed structures not on the Outer Continental Shelf have not reported injuries on those structures to the Department of Labor in the belief that the appropriate state workmen's compensation statute was applicable to them. If the Fifth Circuit's decision is given retrospective effect, there is a ten-year volume of claims which could be presented to the Department of Labor. Such a development would create a variety of problems associated with the number of claims, the age of those claims, the prior handling of them as state compensation matters, and the inevitable interference with orderly administration of current claims.

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[42] 707 F.2d 179 (5th Cir. 1983).

[43] 33 U.S.C. §903.

Any question as to retrospective application left open in this decision would not likely be answered for several years. The question would have to pass through administrative handling in the Office of Workmen's Compensation Programs, hearing and decision by an administrative law judge, and consideration by the Benefits Review Board before reaching the Fifth Circuit for an authoritative ruling. The age of this claim at this stage of proceedings is a fair indication of what time will pass before the question is finally answered. In the meantime, the disrupting effect of the opinion below will have been experienced by the administrators of LHWCA, employers, and carriers.

CONCLUSION

Amici Curiae submit that the opinion of the Fifth Circuit herein reaches a conclusion which is contrary to Congressional intent as expressed in the 1972 Amendments to the Longshoreman's and Harbor Workers' Compensation Act, to prior opinions of the same circuit court of appeals, and to controlling decisions of this Court. The Fifth Circuit's decision is nothing less than a determination to greatly expand the coverage of the LHWCA for reasons which are not relevant to the controlling legal question and which are based on factually unsupported findings concerning the nature of structures in territorial waters. The massive expansion of LHWCA coverage undertaken by the Fifth Circuit should have been reserved to Congress. The opinion below should therefore be reversed by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the above and foregoing have been served on all parties required to be served by placing same in the United States Mail, postage prepaid on this the 2nd Day of May, 1984.

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